

In the Matter of:

Proceedings

May 17, 2019



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IN THE UNITED STATES DISTRICT COURT

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FOR THE EASTERN DISTRICT OF VIRGINIA

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Alexandria Division

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UNITED STATES OF AMERICA, :

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Plaintiff, :

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vs. : Case No.

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BIJAN RAFIEKIAN, : 1:18-cr-00457

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Defendant. :

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Alexandria, Virginia

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Friday, May 17, 2019

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The above-entitled matter came on to be

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heard before the HONORABLE ANTHONY J. TRENGA, Judge in

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and for the United States District Court for the

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Eastern District of Virginia, located at 401 Courthouse

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Square, Alexandria, Virginia, commencing at 9:45 a.m.,

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when were present on behalf of the respective parties:

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1 A P P E A R A N C E S

2

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1 A P P E A R A N C E S

2 (Continued)

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1 P R O C E E D I N G S

2 THE CLERK: Criminal Number 2018-457,
3 United States of America versus Bijan Rafiekian.

4 MR. GILLIS: Good morning. Jim Gillis,
5 John Gibbs and Evan Turgeon for the United States.

6 THE COURT: Good morning.

7 MR. TROUT: Good morning, Your Honor.
8 Robert Trout, Stacey Mitchell, Mark MacDougall and
9 Jack Murphy on behalf of the defendant.

10 Your Honor, I will be the one arguing the
11 motion with respect to the motion to compel, and
12 Mr. Murphy will be arguing the motion on the
13 kickbacks issue.

14 THE COURT: All right. I reviewed the
15 briefing. Let me please hear from counsel.

16 MR. TROUT: Thank you, Your Honor. On the
17 motion to compel, we have a very specific request.
18 It is that we -- that the government produced
19 evidence that would demonstrate that the senior
20 officials in the Turkish government, President
21 Erodgan and his senior subordinates, would object to,
22 would find anathema any comparison of the Muslim

1 Brotherhood to terrorists, any designation of the
2 Muslim Brotherhood to a terrorist organization or any
3 comparison to the Gulenists, whom these Turkish
4 officials view as terrorists.

5 We believe, Your Honor, that when you look
6 at what the issue is in this case, which is whether
7 the defendant agreed to operate in the United States
8 under the direction and control of the government of
9 Turkey or Turkish officials, that this evidence is
10 highly relevant. You will recall that the op-ed --
11 that the Flynn op-ed from January -- excuse me, from
12 November 8, 2016, clearly compared at great length
13 the Muslim Brotherhood to the Gulenists as a way of
14 demonizing the Gulenists --

15 THE COURT: Before the American public.

16 MR. TROUT: Before the American public.

17 -- and the information that we're looking
18 for, Your Honor, is clearly that Turkey and the
19 Turkish government would never have sanctioned such a
20 comparison, especially to the American public.

21 We have -- in the reply brief, Your Honor,
22 we included some material, including a reference to

1 testimony from Secretary Tillerson before the House
2 Foreign Affairs Committee. Secretary Tillerson made
3 it very clear that condemning the Muslim Brotherhood
4 as a terrorist organization would present problems,
5 specifically for Turkey. Your Honor, we do not
6 believe that Secretary Tillerson was winging it. We
7 think that he was basing his testimony on the basis
8 of agreed wisdom developed in the Department of
9 State, briefing books that would essentially
10 substantiate exactly the point that we're trying to
11 make. And especially to an American audience,
12 President Erodgan would clearly not want this sort of
13 comparison of the Muslim Brotherhood to be made to
14 terrorists, and I think the point that we make about
15 Secretary Tillerson's testimony to the Foreign
16 Affairs Committee is precisely the point. They do
17 not want this government to condemn the Muslim
18 Brotherhood. It will complicate the relationship.

19 And so it seems to us, very clear, that
20 this is highly exculpatory because it would
21 demonstrate that the Turkish government was in no way
22 involved in the development of this op-ed piece.

1 There is actually no evidence that we have seen that
2 the Turkish government or anyone in Turkey -- in the
3 Turkish government and any official had an advance
4 copy of the op-ed piece. We have seen no evidence
5 that the Turkish government itself or any Turkish
6 official himself or herself actually reacted after
7 the fact to the piece.

8 The government, in its response, has
9 essentially made a jury argument that, well,
10 Alptekin, in Turkey, expressed appreciation for the
11 op-ed. They would argue he embraced the op-ed. And
12 in that regard, Your Honor, I would like to refer the
13 Court to one of the exhibits that was actually
14 attached to the government's brief. You will recall
15 Attachment A is an e-mail from November 2nd. This is
16 the e-mail -- the first e-mail that our client,
17 Mr. Rafiekian sent to Mr. Alptekin attaching for the
18 first time a draft of the op-ed for comment. This
19 was in response --

20 THE COURT: Right. I remember the e-mail.

21 MR. TROUT: So that was on November 4th.

22 And if you go to Attachment B, which is going to be

1 Government Exhibit 48-A, you see that there was a
2 telephone -- there was a conversation between
3 Mr. Alptekin and Mr. Rafiekian, and Mr. Rafiekian now
4 sends a further draft. There's not a dime's worth of
5 difference between the two drafts in any material
6 way, but here's what he said: Ekim, I just left
7 M.F., Michael Flynn. The arrow has left the bow.
8 The attached article will be published on Monday.
9 Attaches the revised draft, and, again, there is no
10 difference. This is a very high-profile exposure one
11 day before the election. I -- and this is an
12 important sentence. I told M.F. about your advice
13 and concern. He wants you to know that he
14 appreciates your professional and valuable advice on
15 a personal level. I can tell you, from working
16 together closely for over a decade, that he places a
17 significant value on this type of insight in the best
18 military traditions. Your Honor, that amounts to
19 politesse. It is diplomatic speak for thanks for
20 your comments, noted, rejected.

21 So there is evidence in the record that
22 actually contradicts the point that the government

1 would make, and the reality is that these are just
2 jury arguments. We'll have an opportunity to make
3 this argument to the jury just as the government will
4 make its argument.

5 THE COURT: Right.

6 MR. TROUT: We point that out, we give the
7 government a preview of what we might be talking
8 about because we have nothing to hide. We want the
9 Court to be fully informed. And the more informed
10 the Court is on these issues, the better from our
11 perspective.

12 That is a reminder to us -- to me, Your
13 Honor. We were surprised, shocked, in fact, to read
14 that the government is taking the position that
15 Turkey paid for the op-ed, that Turkey paid Flynn --
16 the fees to Flynn Intel Group. We see no evidence of
17 that. If it exists, it's well hidden. And we would
18 ask the Court to insist either that they acknowledge
19 that there is no such evidence or to tell us without
20 further delay exactly what that evidence is, Bates
21 numbers, so that we know where to go find it because
22 right now, we have seen no evidence that Turkey

1 funded this work by Flynn Intel Group.

2 THE COURT: Well, that will be their
3 obligation at trial. So...

4 MR. TROUT: Right. Your Honor, just last
5 issue on this. The government is making available to
6 us a lot of information from the Department of State.
7 It relates to the extradition efforts for Mr. Gulen.
8 So the fact that they are willing to go to the State
9 Department to look for information is useful, but
10 what we need is the information from the State
11 Department specifically that we have identified.
12 It's a specific request under Brady. We've told them
13 where to look, and we think there's no excuse for
14 them not going through that trouble.

15 THE COURT: All right.

16 MR. TROUT: Thank you.

17 MR. GIBBS: Your Honor, I think at one
18 point in Mr. Trout's argument, he sort of made a
19 distinction between evidence and argument. I think
20 that's really the issue here is the defense has asked
21 the government two months -- less than two months
22 before trial now to provide information from the

1 State Department and intelligence agencies, which
2 undoubtedly would include CIA, NSA and probably DIA,
3 about a foreign head of state and a foreign
4 government and sort of what our government's
5 assessment of that government is and sort of what
6 their interests are.

7 You know, the request starts off as asking
8 about President Erodgan and whether he's ever been a
9 member of or affiliated with or sympathetic to the
10 Muslim Brotherhood. It's an incredibly expansive
11 request. The problem is at the end of it, they just
12 want to be able to make an argument. They want to be
13 able to say because President Erodgan or the
14 government of Turkey was sympathetic to the Muslim
15 Brotherhood, this notion that they would have an
16 agency relationship with someone who would criticize
17 the Muslim Brotherhood is anathema, it's something
18 they would be opposed to. That's an argument.

19 There's not going to be evidence of -- even
20 if there's evidence of Erodgan being sympathetic to
21 or a member of the Muslim Brotherhood, the defense
22 already has that. They attached at least three

1 articles that talked about -- that they talked about
2 Rex Tillerson. That evidence was out there. If they
3 want to present that evidence, they could put on an
4 expert who would say that. But the argument that
5 they want to attach to that evidence that there's no
6 way that this agency relationship could exist because
7 it's so anathema, that's an argument they can make,
8 and then we can obviously make our own
9 counterargument. But to ask the government to go and
10 search what would undoubtedly be highly classified
11 evidence on this wild goose chase -- because even if
12 there was evidence -- you know, even if there was
13 information that said -- you know, from some analyst
14 at CIA that said President Erodgan is sympathetic to
15 the Muslim Brotherhood, they're not going to say, and
16 that sympathy is so great that if he ever entered
17 into an agency relationship, he wouldn't be able to
18 maintain it with someone who criticized the Muslim
19 brotherhood.

20 So, you know, this is just a case where
21 this request is so broad, so unreasonable, especially
22 in light of the op-ed itself. I mean, defense

1 focused exclusively on the Muslim Brotherhood, but if
2 the Court -- I know the Court has read the article,
3 the op-ed. It's focused on Gulen. It's not focused
4 on the Muslim Brotherhood. Does it mention the
5 Muslim Brotherhood? Absolutely. And as Your Honor
6 pointed out, the op-ed was aimed at the American
7 people. For many people in this country, the Muslim
8 Brotherhood is not seen in a positive light. So we
9 have an op-ed about Gulen that talks about the Muslim
10 Brotherhood and then Osama bin Laden and Ayatollah
11 Khomeini. The thrust of it is clearly discrediting
12 Fethullah Gulen.

13 And finally, Your Honor, the crux of the
14 951 charge is to hide the hand of Turkey in trying to
15 influence the American people. So in an incredibly
16 clever way, the fact that there's some information in
17 there about the Muslim Brotherhood could well be some
18 sort of misdirection. Because anyone who is
19 sophisticated in these matters could look at that and
20 say, well, they said something negative about the
21 Muslim Brotherhood. Turkey probably isn't behind
22 this because they like the Muslim Brotherhood.

1 But, Your Honor, again, I think the
2 ultimate point comes down to the fact that the
3 defense requested this information in January. They
4 waited three months to file the motion to compel.
5 We're now two months out from trial. They're asking
6 us to conduct this expansive wild goose chase
7 throughout a number of intelligence agencies,
8 throughout the State Department for information that
9 undoubtedly will be highly classified to get
10 ultimately information that they already have, that
11 Erodgan and the Turkish government are sympathetic to
12 the Muslim Brotherhood, so they can make an argument
13 and build upon that. But that argument is not going
14 to be in any of those places, and it's inappropriate
15 to send the government off on that wild goose chase.
16 Thank you, Your Honor.

17 THE COURT: All right. Mr. Trout.

18 MR. TROUT: Thank you, Your Honor. Well,
19 of course, we're going to be making arguments, but
20 we're going to be making those arguments on the basis
21 of evidence and that's what we're looking for, Your
22 Honor. We don't have the resources to hire and

1 Mr. Rafiekian does not have the resources to hire an
2 expert. And if there are experts out there who agree
3 with --

4 THE COURT: Well, it sounds like you
5 already have the information you need to make the
6 argument.

7 MR. TROUT: Well, we do want to make sure
8 that we have evidence. We do believe that if we --
9 for example, if we did have an expert, we can expect
10 that the government would try to impeach that expert,
11 try to argue bias, try to maybe show that the expert
12 was some hack. And what we believe is that they --
13 all of that would be done in the face of the reality
14 that the government's own experts agree with the
15 point and that's wrong.

16 And so, Your Honor, what we -- if you want
17 to narrow the scope, that's fine but as I say, I
18 don't believe that Secretary Tillerson was making it
19 up on the fly. I think that there would have been
20 briefing books and there would be, you know, kind of
21 an agreed wisdom within the State Department that,
22 yes, this is going to be a complication for our

1 relationship with Turkey and, yes, it was intended
2 for a U.S. audience, which is exactly why Erodgan
3 would have objected most vociferously.

4 The question here is -- and this will be
5 argument, but the question is, did Mr. Rafiekian
6 agree to operate under the direction and control of
7 Turkey? And I can't imagine what could be more
8 exculpatory than an op-ed piece that includes
9 significant elements that Turkey clearly would have
10 found anathema. And for that reason, Your Honor, we
11 believe that even a narrow search will yield the
12 information that we're looking for --

13 THE COURT: All right.

14 MR. TROUT: -- that we could perhaps use
15 that as an admission by a party, and it would be
16 evidence in that sense.

17 THE COURT: All right.

18 MR. TROUT: Thank you.

19 THE COURT: Thank you. Let me hear the
20 second motion as well. Mr. MacDougall.

21 Oh, I'm sorry. Yes, sir. I think the
22 government has essentially agreed to your position.

1 MR. MURPHY: Good morning, Your Honor.

2 Yes, in part. The government has acknowledged that
3 it won't be using the term "kickback" in connection
4 with its opening statement or in connection with its
5 questioning of witnesses --

6 THE COURT: Right.

7 MR. MURPHY: -- but it does wish to use
8 that term in its closing argument.

9 THE COURT: Right.

10 MR. MURPHY: The issue here is pretty
11 straightforward that the government admits that the
12 term "kickback" implies illegality. And they don't
13 claim that these payments themselves were actually
14 illegal. Mr. Rafiekian has not been charged with any
15 crime arising from these payments. He has been
16 charged with failing to register as a foreign agent
17 and with making false statements in a FARA filing.
18 Now, none of the false statements in that FARA filing
19 actually have anything to do with the payments at
20 issue.

21 So under those circumstances, it would be
22 highly prejudicial for the government to refer to

1 those payments as kickbacks or to otherwise suggest
2 that they were illegal. It's basically a backdoor
3 way, Your Honor, for the government to suggest to the
4 jury that the defendant has committed other crimes
5 for which he has not been charged. If the government
6 were allowed to use the term, the jury might conclude
7 incorrectly that the payments themselves were illegal
8 and might, therefore, reason that Mr. Rafiekian is
9 more likely to be guilty of the crimes for which he
10 has been charged. There's no reason to allow the
11 possibility for that prejudice or confusion into this
12 trial.

13 So for these reasons, we would request that
14 even in the closing argument, the government be
15 precluded from using the term "kickback."

16 THE COURT: All right.

17 MR. MURPHY: Thank you.

18 THE COURT: Yes.

19 MR. GILLIS: Your Honor, there would be
20 nothing unduly prejudicial or unfair in our using
21 that argument in our closing. It doesn't even meet
22 the standard that the defense has set forth in page

1 three. It does not constitute unfair prejudice to
2 call a spade a spade in closing argument. It would
3 not confuse or mislead the jury because it is
4 integral to the conspiracy that we have charged that
5 there was a payment immediately back to Alptekin as
6 soon as Alptekin paid FIG. So there would be no
7 economic reason for that to take place. And, indeed,
8 as the evidence will infer and show to the jury or
9 the jury would be permitted to infer that this was
10 simply an extension of what was agreed to when the
11 government of Turkey was giving the green light for
12 the budget in this case and when the involvement of
13 the Turkish officials was plainly controlling the
14 direction of this project.

15 So, Your Honor, it is perfectly appropriate
16 to argue these things. It does not meet any of the
17 standards for finding argument improper. First, the
18 evidence will certainly permit the jury to make that
19 inference that this was a payment back to Alptekin
20 for an illicit purpose. That is one of the standards
21 that the defense itself mentions on page five of
22 their arguments, that it need not be simply illegal

1 but this payment was certainly illicit as part and
2 parcel of this conspiracy as we have charged. It is
3 a 20 percent payment back immediately after the
4 payment was made. It strongly infers that the
5 initial payment from Alptekin to FIG came from
6 somewhere else, that is, the government of Turkey, if
7 FIG is immediately kicking back 40 percent -- or
8 rather 20 percent in the form of \$40,000.

9 So it does not result in a -- the evidence
10 will permit the jury to make that inference. It will
11 not mislead the jury. This is an integral part of
12 our case against the defendant. It is not unfairly
13 prejudicial because it falls within the definition of
14 what a kickback is. It's not as if we're using some
15 pejorative slang term to refer to the defendant. We
16 are using what is a dictionary definition of the term
17 "kickback." And it also would not introduce
18 prejudicial extraneous matters that would confuse or
19 mislead the jury. The evidence will be ample on this
20 point, Your Honor, and so it would be perfectly
21 appropriate to allow us to refer to it.

22 At the very least, Your Honor, we submit

1 that this -- at least this aspect of the defendant's
2 motion is premature. The Court should first see what
3 the evidence has been and what inferences that
4 evidence would permit and what then would be
5 appropriate arguments to the jury. But if the Court
6 is inclined to rule now, we certainly believe that
7 it's perfectly appropriate for us to do that. Thank
8 you, Your Honor.

9 THE COURT: All right. Thank you.

10 Counsel, I'll give you the last word on
11 this. Why shouldn't the Court wait and see what the
12 evidence is?

13 MR. MURPHY: Your Honor, that's certainly a
14 possibility, but, frankly, respectfully, the Court
15 has all the information now that it needs to make
16 this decision now. The government does not allege in
17 its indictment that the payments themselves were
18 illegal or even illicit. And you just heard from
19 Mr. Gillis, and he didn't argue that the payments
20 themselves were illegal. Now, he used the term
21 "illicit," but what he's really saying is that the
22 payments were part of a broader what he calls an

1 illegal scheme but that's not the right way to look
2 at it. The point -- first of all, that actually
3 presumes that Mr. Rafiekian is guilty of the crimes
4 for which he's being charged. But second, the issue
5 isn't whether the payments were part of some broader
6 illegal scheme. The issue is whether the payments
7 themselves, independent of the crimes being charged,
8 were illegal. Now, in the government's brief, they
9 concede that the term "kickback" implies illegality,
10 but, again, they have not said that those payments
11 themselves were actually illegal. So it is
12 appropriate for resolution now.

13 THE COURT: All right. Thank you.

14 MR. MURPHY: Thank you.

15 THE COURT: Let me first deal with the
16 motion to preclude any reference to kickback. The
17 Court, at this time, is going to grant the motion to
18 the extent that the reference to a kickback will not
19 be mentioned during the course of the trial itself,
20 either in opening or during the presentation of the
21 evidence. And the Court is going to reserve on that
22 issue with respect to closing argument based on the

1 evidence that the Court hears.

2 Let me speak also to the motion to compel
3 records. In that motion, the defendant asked the
4 Court to compel the United States to produce two
5 categories of documents. The first is all
6 information within the United States government's
7 possession, including the State Department and the
8 intelligence agencies, that indicates that President
9 Erodgan has ever been a member of or otherwise
10 affiliated with or sympathetic to the Muslim
11 Brotherhood. And secondly, all information within
12 the United States government's possession, including
13 the State Department, that tends to show that the
14 Turkish government officials, including President
15 Erodgan, would disagree or disapprove of any
16 comparison between Fethullah Gulen or his followers
17 and the Muslim Brotherhood.

18 The motion obviously needs to be considered
19 against the backdrop of the indictment that was
20 returned in this case. That indictment charges the
21 defendant with conspiracy to act as an agent of a
22 foreign government and to make false statements and

1 omissions in a FARA filing and acting in the United
2 States as an agent of a foreign government,
3 specifically Turkey. In that regard, the indictment,
4 in large part, focuses on the publication of an op-ed
5 entitled, "Our Ally Turkey is in Crisis and Needs Our
6 Support," which was published in The Hill Newspaper
7 on November 8, 2016. The op-ed, which listed Michael
8 Flynn as its author, blamed Gulen for an attempted
9 coup in Turkey and included an unflattering
10 comparison of Gulen to members of the Muslim
11 Brotherhood. Some news articles indicate that
12 Erodgan, the Turkish president, is an ally of and
13 sympathetic to the Muslim Brotherhood, and the
14 defendant now seeks to compel the government to
15 produce any documents probative of Erodgan's
16 connection to the Muslim Brotherhood based on the
17 government's obligations under Brady versus Maryland.

18 The indictment also describes several wire
19 transfers between FIG, Inovo and the defendant
20 Alptekin from September to November 2016. These
21 payments relate to various advisory services.

22 The issue is everyone seems to agree that

1 the -- it's going to be -- there's an argument to be
2 made based on the relationship or attitudes of the
3 Turkish government or President Erodgan and the
4 Muslim Brotherhood. But the issue is whether this
5 information is required under Brady versus Maryland.
6 In that case, the Supreme Court held that the
7 suppression by the government of evidence favorable
8 to an accused violates due process where the evidence
9 is material either to guilt or punishment
10 irrespective of the good faith or bad faith of the
11 prosecution. Under Brady and also under Giglio, the
12 government is required to produce and disclose not
13 only evidence favorable to the accused when it's
14 material -- is only required to disclose evidence
15 favorable to the accused when it's material such that
16 prejudice would ensue from its suppression. And with
17 respect to materiality regarding the inquiry is
18 whether the favorable information could reasonably be
19 taken to put the whole case in such a different light
20 as to undermine confidence in the verdict.

21 Here the Court has reviewed the detailed
22 filings and has reflected on the probative value of

1 what the defendant seeks, and the Court concludes
2 that the documents the defendant seeks to compel are
3 simply too attenuated to qualify as material under
4 Brady or Giglio. The defendant's broad document
5 request extend to any government documents indicative
6 of ties between Erodgan and the Turkish government
7 and the Muslim Brotherhood, and this request is
8 premised on the argument that because of President
9 Erodgan and his government's ties to the Muslim
10 Brotherhood, they would not have signed off on the
11 publication of an op-ed that includes one sentence
12 unfavorably equating Gulen to members of the Muslim
13 Brotherhood. And in making this argument, the
14 defendant, in substance, contends that a conspiracy
15 to act as an agent of Turkey, as the defendant is
16 charged with doing, is simply less likely if his
17 goals and those of the Turkish government diverged in
18 any way. However, the conspiracy alleged in the
19 indictment was for the specific purpose of
20 discrediting Gulen. Such a conspiracy could have
21 existed even if the defendant's interests and those
22 of the Turkish government only converged with respect

1 to one particular issue. And the documents that
2 Rafiekian seeks are not plausibly probative of
3 whether Erodgan and the Turkish government would have
4 signed off on an op-ed that included a line critical
5 of the Muslim Brotherhood.

6 So for these reasons, the Court concludes
7 that the plaintiff (sic) has not demonstrated
8 materiality or prejudice with respect to his
9 inability to access the documents he seeks, and the
10 Court is going to deny that request.

11 Mr. Trout, with respect to your other
12 request, there's really nothing before the Court. If
13 you want the Court to rule on anything along the
14 lines that you're requesting, you should file a
15 motion.

16 MR. TROUT: All right. Very well, Your
17 Honor. Thank you.

18 THE COURT: All right. Anything further?
19 I assume everything is on tract otherwise?

20 MR. GILLIS: Perfectly on track, Your
21 Honor.

22 THE COURT: All right. Good.

1 MR. GILLIS: If I may -- if I could confer
2 with counsel for one moment.

3 THE COURT: Yes.

4 (Discussion between counsel out of
5 hearing.)

6 MR. GILLIS: Excuse me. Pardon me, Your
7 Honor. One matter that I would like clarified is to
8 have the defense confirm that they will not be
9 offering any classified information. They received
10 class -- they received security clearances in order
11 to speak with the defendant, who may have had
12 classified information that they may have found to be
13 relevant in this case.

14 THE COURT: Right.

15 MR. GILLIS: There was a deadline for
16 filing a CIPA Section 5 notice that has come and
17 passed.

18 With respect to our motion to continue a
19 portion of our responsibilities to produce classified
20 information, we've been able to present or will be
21 able to present that in an unclassified form. So
22 there's no additional classified discovery that we

1 expect at this time. So I would like to confirm that
2 that -- that there will be --

3 THE COURT: Have you presented that
4 unclassified form to the defendants?

5 MR. GILLIS: We have presented them with a
6 protective order that would be necessary, and we hope
7 to have that agreed upon. And then we will produce
8 the remaining documents. They are only arguably
9 relevant, Your Honor. And so out of an abundance of
10 caution, we plan to produce it to them. If we're
11 unable to reach an agreement on the protective order,
12 we'll go back to our principals and get some further
13 instructions on that.

14 THE COURT: All right.

15 MR. GILLIS: We have -- just to inform the
16 Court, we have, at this point, just 50 pages or so
17 remaining in what we will produce upon agreement upon
18 this protective order. And apart from that, we are
19 done with producing our discovery.

20 THE COURT: All right. Mr. MacDougall.

21 MR. MACDOUGALL: Your Honor, if I may
22 address the CIPA 5 issue first. And if we had

1 misread the Court's prior direction, we apologize.
2 Certainly we had relied upon the colloquy the Court
3 had with Ms. Mitchell on April 19th to have all of
4 the CIPA notices and other notices filed seven days
5 after the government completed its production of
6 classified information.

7 Now, I understand the Court entered an
8 order on May 7th that was issued pursuant to a motion
9 filed in a SCIF by the government I believe that day.
10 I was out of the country until that Friday.

11 Mr. Trout and I was the only member of the defense
12 team cleared. Mr. Trout was not cleared until the
13 9th. We both went in on the 10th and looked at it
14 and realized that the order had already been filed.

15 We want to take the opportunity while we're
16 before the Court to ask the Court's indulgence that
17 if we do -- and we haven't decided whether we need to
18 or not -- wait until the government, which as I
19 understand, Monday will complete its classified
20 information production, and then we would file a CIPA
21 5 notice if one were necessary by the 28th, the 27th,
22 Monday, being Memorial Day.

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1 THE COURT: All right. I'll allow you to
2 do that.

3 MR. MACDOUGALL: Thank you, Your Honor.

4 THE COURT: All right.

5 MR. MACDOUGALL: With regard to that date
6 of May 28th, again, just because of some of the shift
7 in dates, we want to be certain that we were in line
8 with the Court's view and the government's that our
9 remaining pretrial motions are also due on May 28th,
10 which will be seven days after the last production.

11 THE COURT: I think that's right.

12 MR. MACDOUGALL: Thank you, Your Honor.

13 THE COURT: Do you want to be heard on this
14 at all, Mr. --

15 MR. GILLIS: No, Your Honor.

16 THE COURT: Okay. The 28th is fine.

17 MR. GILLIS: Pardon me. I just neglected
18 to say one thing. We do -- may we approach about
19 this, Your Honor?

20 THE COURT: Yes. Let me let Mr. MacDougall
21 finish --

22 MR. GILLIS: Okay. I beg your pardon.

1 MR. MACDOUGALL: So the 28th would be,
2 again, based upon our reading of the record, the day
3 that all of our pretrial motions are due.

4 THE COURT: Right.

5 MR. MACDOUGALL: Two other matters very
6 briefly, Your Honor. With regard to Covington, we
7 would anticipate filing a motion, which we'll serve
8 on Covington. There's a very large production that
9 they've made. There are 32 documents we've
10 identified. They're heavily redacted. In our
11 inquiries to Covington, they've told us that they are
12 not producing a privilege log. So those documents
13 are redacted for whatever reasons they're redacted,
14 and we propose to submit those to the Court for
15 in-camera review.

16 THE COURT: All right.

17 MR. MACDOUGALL: And we'll file that --

18 THE COURT: All right. And the Court knows
19 it has under advisement the competing protective
20 orders on that with respect to the use of those at
21 trial, and I'll issue something shortly if -- I'm
22 assuming that's not holding up anything that's

1 between --

2 MR. MACDOUGALL: No, Your Honor. That was
3 my other question. Thank you, Your Honor.

4 THE COURT: All right. I'll see counsel at
5 the bench.

6 (Whereupon, the following bench conference
7 was had:)

8 MR. GILLIS: I just wanted to inform the
9 Court that I told defense counsel we are going to be
10 filing a superseding indictment. If I may, Your
11 Honor, we're filing a superseding indictment but
12 solely to correct one statement in the indictment,
13 and then we also are going to incorporate our bill of
14 particulars into that but that we -- no substantive
15 changes whatsoever --

16 THE COURT: When are you going to issue it?

17 MR. GILLIS: I expect to present it next
18 week, Your Honor.

19 THE COURT: All right.

20 MR. GILLIS: But it's a purely technical
21 correction, Your Honor.

22 THE COURT: All right. Well, let's get it

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1 filed as soon as possible.

2 MR. GILLIS: Absolutely, Your Honor.

3 THE COURT: Thank you.

4 (Whereupon, the bench conference
5 concluded.)

6 THE COURT: All right. Counsel is excused.

7 MR. GILLIS: Thank you, Your Honor.

8 (Whereupon, at 10:25 a.m., the
9 proceedings concluded.)

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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, LAQUICIA THOMAS, Court Reporter and Notary
3 Public in and for the Commonwealth of Virginia at
4 Large, and whose commission expires February 28, 2022,
5 do certify that the foregoing is a true, correct, and
6 full transcript of the proceedings.

7 I further certify that I am neither related to
8 or associated with any counsel or party to the
9 proceedings; nor otherwise interested in the event
10 thereof.

11 

12
13 _____
14 LaQuicia Thomas
15 Notary Public
16 Commonwealth of Virginia at Large
17 Notary No. 7363169
18
19
20
21
22